UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2012 MSPB 76

Docket No. SF-0353-10-0517-I-2

Rowena G. Richards,

Appellant,

v.

United States Postal Service,

Agency.

June 29, 2012

Robert Jeffrey, Oakland, California, for the appellant.

Monique L. Rutter, Esquire, San Francisco, California, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Anne M. Wagner, Vice Chairman
Mark A. Robbins, Member

OPINION AND ORDER

¶1 The appellant has filed a petition for review of an initial decision that denied her restoration claims on the merits. For the following reasons, we MODIFY the initial decision and DISMISS the appeal for lack of jurisdiction.

BACKGROUND

¶2 On February 11, 2010, the appellant, a partially recovered preference eligible working in a modified assignment, received a Notice of No Work Available letter pursuant to the Postal Service's National Reassessment Process (NRP). MSPB Docket No. SF-0353-10-0517-I-1, Initial Appeal File (IAF-1), Tab 2 at 1-2. The agency thereafter informed her that it was unable to find

operationally necessary work for her within her medical restrictions and discontinued her modified assignment. *Id.* at 1-2, 12. The appellant filed an initial appeal. IAF-1, Tab 2. After notifying the appellant of the jurisdictional burden of proof over a restoration claim for a partially recovered individual and allowing the parties the opportunity to submit argument and evidence on jurisdiction, the administrative judge found that the appellant made a nonfrivolous allegation of jurisdiction and held a hearing on the merits. IAF-1, Tabs 3, 8, 17. After the hearing, the administrative judge found that the appellant established the first three elements of her restoration claim by preponderant evidence but she did not demonstrate that the agency's denial of restoration was arbitrary and capricious. MSPB Docket No. SF-0353-10-0517-I-2, Initial Appeal File (IAF-2), Tab 13, Initial Decision (ID) at 8-12. The administrative judge found that the agency conducted a search for available work within the appellant's medical restrictions and within the local commuting area. ID at 9. She also found that the appellant failed to prove that there were available duties that she was able to perform within her medical restrictions. ID at 10-11.

¶3 The appellant has filed a brief petition for review arguing that the initial decision was incorrect in light of the testimony of agency witnesses. Petition for Review (PFR) File, Tab 1 at 1. She argues that the Board should review the testimony of Caesar Penaflor, a Lead Manager at her facility, because it demonstrates that other employees were assigned to perform assignments that were not a part of their regular duty assignments. *Id.* She further argues that these other assignments were available and within her medical restrictions. *Id.* The agency has filed an opposition. PFR File, Tab 3.

ANALYSIS

¶4 After the appellant filed her petition, the Board issued its decision in *Latham v. U.S. Postal Service*, 117 M.S.P.R. 400, ¶ 10 (2012), which changed the jurisdictional test for a partially recovered individual from a nonfrivolous

allegation of each element of a restoration claim to a preponderance of the evidence standard, in accordance with our reviewing court's decision in *Bledsoe v. Merit Systems Protection Board*, 659 F.3d 1097, 1104 (Fed. Cir. 2011). Thus, under the current test, in order to establish jurisdiction over a restoration appeal as a partially recovered individual, an appellant must prove by preponderant evidence that: (1) She was absent from her position due to a compensable injury; (2) she recovered sufficiently to return to duty on a part-time basis or to return to work in a position with less demanding physical requirements than those previously required of her; (3) the agency denied her request for restoration; and (4) the denial was arbitrary and capricious. *Bledsoe*, 659 F.3d at 1104; *Latham*, 117 M.S.P.R. 400, ¶ 10. If the appellant makes a nonfrivolous allegation of jurisdiction, she is entitled to a jurisdictional hearing at which she must prove jurisdiction by preponderant evidence. *Bledsoe*, 659 F.3d at 1102, 1106. If the appellant establishes jurisdiction over her restoration claim, she also prevails on the merits. *Latham*, 117 M.S.P.R. 400, ¶ 10 & n.9. The appellant here received a hearing in which the administrative judge evaluated her claim under a preponderance of the evidence standard and denied her restoration claim on the merits. Although we agree with the administrative judge's conclusion that the appellant failed to establish by preponderant evidence that the agency's actions were arbitrary and capricious, we modify the initial decision to dismiss the appeal for lack of jurisdiction in accordance with *Bledsoe* and *Latham*.

¶5 It is undisputed that the appellant has satisfied the first three jurisdictional elements. The record reflects that the appellant suffered a compensable injury, that she recovered sufficiently to return to duty and was restored to duty in a modified assignment, and that the agency denied her request for restoration after it discontinued her modified assignment under the NRP. IAF-1, Tab 5 at 2-7, Tab 7, Subtab K; *see Latham*, 117 M.S.P.R. 400, ¶¶ 2, 11. Thus, the ultimate issue is whether the appellant has demonstrated by preponderant evidence that the denial

of restoration was arbitrary and capricious. *Latham*, 117 M.S.P.R. 400, ¶ 11. We find that she has not met her burden of proof on this issue.

¶6 The appellant argued below that the agency violated its Employee and Labor Relations Manual and failed to follow its own regulations because there were available tasks to which the agency could have assigned her. IAF-2, Tab 4 at 5-6. In *Latham*, the Board held that its jurisdiction under 5 C.F.R. § 353.304(c) may encompass a claim that an agency's violation of its internal rules resulted in an arbitrary and capricious denial of restoration. *Latham*, 117 M.S.P.R. 400, ¶ 11. The Board found that the Postal Service's rules required the agency to offer modified assignments to partially recovered individuals whenever work is available and within their medical restrictions. *Id.*, ¶ 30. The Board further determined that, under the agency's rules, it may discontinue a modified assignment consisting of tasks within an employee's medical restrictions only when the duties of that assignment no longer need to be performed by anyone or those duties need to be transferred to other employees in order to provide them with sufficient work. *Id.*, ¶ 31. *Latham* set forth the following line of inquiry as a relevant framework for analyzing the "availability" of work under such circumstances: (1) Are the tasks of the appellant's former modified assignment still being performed by other employees? (2) If so, did those employees lack sufficient work prior to absorbing the appellant's modified duties? (3) If so, did the reassignment of that work violate any other law, rule, or regulation? *Id.*, ¶ 33. An appellant may also satisfy the first prong of this inquiry by identifying other tasks within her medical restrictions that were available for her to perform either inside or outside the context of a vacant funded position. *See id.*, ¶ 55. The appellant did not argue below and does not argue on review that the tasks of her former modified assignment were still being performed by other employees or that such employees did not lack sufficient work prior to absorbing her modified duties. Indeed, there is no testimony or evidence from the appellant on this

matter.[1] The appellant does, however, argue that there were other tasks within her medical restrictions that were available for her to perform.[2] PFR File, Tab 1.

¶7 On review, the appellant asserts that Mr. Penaflor's testimony regarding Maria Saenz and Eun Choi, Postal Service employees who performed work outside of their bid positions, demonstrates that there was available work within the appellant's medical restrictions at the facility. PFR File, Tab 1 at 1. She argues that "[t]his detailed assignment" required no pushing or lifting and did not require specialized training. *Id.* We have reviewed the relevant testimony, and we find that the appellant did not prove by preponderant evidence that other tasks within her medical restrictions were available for her to perform either inside or outside the context of a vacant funded position.[3] *See Latham*, 117 M.S.P.R. 400, ¶ 55.

¶8 Ms. Choi testified that, prior to November 2009, her position involved running a "CMS" report. Hearing Compact Disc (HCD). She also testified that,

---

[1] The agency's submissions and evidence indicate that the appellant's duties were absorbed into bid positions encumbered by other employees, but the appellant did not allege that such employees had sufficient work prior to absorbing her modified duties. IAF-1, Tab 16 at 3-4 & Subtab A at 2-3; *see Latham*, 117 M.S.P.R. 400, ¶ 33.

[2] In her submissions below, the appellant listed a number of tasks that she believed could have been assigned to her. IAF-2, Tab 4 at 5-6. Other than providing this list of tasks, however, she did not provide any evidence that these tasks were actually available nor did she demonstrate that they were within her medical restrictions.

[3] The appellant does not make any arguments on review challenging the administrative judge's well-reasoned findings regarding the agency's search within the local commuting area, and we discern no reason to disturb them. IAF-1, Tab 7, Subtabs 4F, 4J; ID at 9; PFR File, Tab 1. Although the appellant appeared initially to be making allegations of disability discrimination, she later clarified that she was not raising such a claim. IAF-2, Tab 5 at 3; Hearing Compact Disc. Additionally, the administrative judge properly notified her that her constructive suspension appeal was subsumed by her restoration claim. IAF-2, Tab 5 at 4; *see Kinglee v. U.S. Postal Service*, 114 M.S.P.R. 473, ¶¶ 19-22 (2010). In *Latham*, the Board left open the possibility that an appellant may proceed on a constructive suspension appeal if the Board is precluded from considering the full scope of an appellant's restoration claim; however, such circumstances are not present here. 117 M.S.P.R. 400, ¶ 27 n.17.

in November 2009, she received a regular bid assignment as a military unit clerk and, since then, has only occasionally run the report when the employee responsible for the report is on leave. *Id.* Mr. Penaflor testified that the report is a responsibility of bid employees and that Ms. Choi occasionally ran the report when a regularly tasked bid employee was on leave. *Id.* He testified that she assisted with the report because she had already been trained and that she only performed this task for a couple of hours every 2 or more weeks. *Id.* Mr. Penaflor also testified that Ms. Saenz, who regularly worked a bid position in automation, was temporarily collecting information regarding the flow of mail. *Id.* He testified that this assignment was not a part of a regular position and that Ms. Saenz would only continue collecting such information as long as management deemed it necessary. *Id.* Mr. Penaflor also testified that Ms. Saenz was not technically detailed to a position because the collection of the information regarding the flow of mail was not a part of any existing position. *Id.*

¶9 We find that this testimony is insufficient to demonstrate by preponderant evidence that there were tasks available to the appellant within her medical restrictions. The testimony reflects that Ms. Choi served in a regular bid position and would occasionally run a report once every couple of weeks. The running of the report was a part of another bid position, and Ms. Choi only performed this task when the regularly scheduled employee was on leave. Neither Mr. Penaflor nor Ms. Choi testified that this additional task was performed during overtime hours or that it impeded Ms. Choi's ability to perform her regular bid position such that tasks within her bid position were available. *Cf. Latham*, 117 M.S.P.R. 400, ¶¶ 69, 74.

¶10 Further, with respect to Ms. Saenz, the appellant has not demonstrated that the tasks of Ms. Saenz's regular bid position in automation were available or that such tasks were within the appellant's medical restrictions. HCD (testimony of Mr. Penaflor and the appellant). Regarding the appellant's argument that she

could perform the tasks that Ms. Saenz was performing outside of her bid position—the gathering of information regarding mail flow—the appellant did not demonstrate that those tasks were available and there was no indication in the record that, as a result of Ms. Saenz being temporarily tasked with this assignment, other work was available. Further, the appellant did not articulate the physical demands of these tasks or demonstrate that they were within her medical restrictions. The appellant's medical restrictions included: lifting/carrying less than 10 pounds intermittently, sitting for 4 hours continuously and 4 hours intermittently, standing for 3 hours continuously and 3 hours intermittently, walking and bending for 2 hours continuously or 4 hours intermittently, twisting for 1 hour continuously or 2 hours intermittently, pulling/pushing for 3 hours continuously or 3 hours intermittently, and no climbing, kneeling, grasping, fine manipulation, reaching above shoulder, driving, or operating machinery.[4] IAF-1, Tab 13. Although Mr. Penaflor testified that Ms. Saenz's temporary duties did not involve lifting or pushing, the appellant did not present any evidence that the tasks necessary for the collection of information regarding the flow of mail within the facility were otherwise within her medical restrictions. Thus, we find that the appellant did not demonstrate that the tasks performed by Ms. Saenz were available and within the appellant's medical restrictions. *See Latham*, 117 M.S.P.R. 400, ¶ 66. We also find, under the facts and circumstances of this case, that the appellant has not otherwise submitted any argument or evidence indicating that the agency's decision to assign work to Ms. Choi and Ms. Saenz was an arbitrary and capricious denial of the appellant's restoration rights. *See id.*, ¶¶ 32-33, 55. For the foregoing reasons, we dismiss the appeal for lack of jurisdiction.

---

[4] At the hearing, the appellant testified that she could only perform an "office job" that does not require lifting more than 10 pounds. HCD. She also testified that she can answer phones, has supervised employees in the past, and that she may be able to case mail, although she was not sure for how long. *Id.*

ORDER

¶11 This is the final decision of the Merit Systems Protection Board in this appeal. Title 5 of the Code of Federal Regulations, section 1201.113(c) (5 C.F.R. § 1201.113(c)).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law, as well as review the Board's regulations and other related material, at our website, http://www.mspb.gov. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's

"Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.